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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

14366A

N THE

EME COURT

OF THE

STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

LARRY B. RENTMEISTER,

Plaintiff and
Respondent.

vs.

Case No. 14366

JUNE R. DeSILVA, JAMES HOWARD
RENTMEISTER, and DONALD NEIL
RENTMEISTER, TRUSTEES OF THE
ESTATE OF DELLA ZILLAH C.
RENTMEISTER,

Defendants and
Appellants.

APPELLANTS' BRIEF

Appeal from the Judgment of the District Court
of Weber County, Hon. Calvin Gould, Judge

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FILED

MAR 2 1976

Clerk, Supreme Court, Utah

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

LARRY B. RENTMEISTER,

Plaintiff and
Respondent.

vs.

JUNE R. DeSILVA, JAMES HOWARD
RENTMEISTER, and DONALD NEIL
RENTMEISTER, TRUSTEES OF THE
ESTATE OF DELLA ZILLAH C.
RENTMEISTER,

Defendants and
Appellants.

Case No. 14366

APPELLANTS' BRIEF

STATEMENT OF KIND OF CASE

This is an action brought by Respondent against Appellants to enforce the provisions of an inter vivos trust executed by Respondent's grandmother and Appellants' mother. Respondent seeks a \$7,000.00 distribution in addition to one-fourth of the residuary estate. Appellants, as co-trustees and beneficiaries of the residuary estate, seek to reform the trust instrument by excluding Respondent from sharing equally in the residuary estate because of a scrivener's error by the attorney

preparing the trust instrument.

DISPOSITION IN LOWER COURT

A non-jury trial was had in this matter and the trial Judge granted judgment in favor of Respondent holding that an inter vivos trust cannot be reformed after the death of the trustor upon the claim of a scrivener's error.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the Judgment in the trial Court and for an order directing that said trust instrument be reformed allowing Respondent his \$7,000.00 distribution but excluding Respondent from sharing equally with Appellants in the residuary estate of the trust.

STATEMENT OF FACTS

In 1968, the trustor, Della Zillah C. Rentmeister, retained attorney, William J. Critchlow, III, to perform estate planning services (R. 81). An inter vivos trust was prepared, executed by trustor and trustees, and introduced into evidence as Exhibit "A" (R. 45). The trust became immediately operative and was funded by the transfer of real and personal property (R. 54 & 86).

During her first visit to Mr. Critchlow, trustor was undecided as to what part of her estate she should leave to her grandson who is the Respondent herein (R. 83). Trustor later

telephoned Mr. Critchlow advising him she wished to leave Respondent the sum of \$5,000.00 and she confirmed the call with a handwritten note entered into evidence (R. 83, 84, & 55b). Exhibit "C" provides in part

"I would like to leave my grandson Della Rentmeister \$5,000.00 and hope that fair. Della Rentmeister phone 825-2472."

Pursuant to trustor's directions, the trust instrument provided in Article III, paragraph E, that Respondent was to receive \$5,000.00 from the trust estate (R. 49 & 50).

Through inadvertence and mistake on the part of the attorney, Article III, paragraph F, was dictated without excluding Respondent from sharing in the residuary estate with the three natural children of trustor, Appellants herein, (R. 50 & 88). The error was not discovered when the trust was executed nor later when it was amended (R. 88 & 89).

In 1971, trustor telephoned Mr. Critchlow and directed him to increase Respondent's share from \$5,000.00 to \$7,000.00 (R. 88). Pursuant to this direction, an amendment to the trust was prepared increasing Respondent's share to \$7,000.00 (R. 88). Said amendment was introduced into evidence as Exhibit "B" (R. 55).

Thereafter, trustor passed away on November 2, 1973 (R. 88). Following trustor's death, Mr. Critchlow received a telephone call from an attorney representing Respondent demanding payment of \$7,000.00 together with an undivided one-fourth interest in the residuary estate of the trust (R. 89). It was at this time that the scrivener's error was discovered and discussed (R. 89).

Should the trust not be reformed, Respondent, as a grandson of trustor, would receive \$7,000.00 more than the natural children of trustor (R. 90). A one-fourth share of the residuary estate amounts to approximately \$20,000.00 (R. 90).

After said demand from Respondent's attorney, Appellants, as co-trustees and beneficiaries of the trust estate, refused to distribute to Respondent an undivided one-fourth interest in the residuary estate and Respondent filed suit (R. 1 & 12). In response thereto, Appellants filed an Answer and Counterclaim praying for reformation of Article III, paragraph F, of the trust instrument (R. 2).

On October 3, 1975, the matter was tried before the Honorable Calvin Gould as a non-jury trial (R. 38). Exhibits "A" and "B", representing the trust instrument and amendment, were entered into evidence by stipulation and Respondent rested his case (R. 78). Thereafter, Appellants called Attorney William J. Critchlow, III, who testified concerning trustor's directions and the scrivener's error.

Thereafter, judgment was entered in favor of Respondent and against Appellants with the trial Court holding that an inter vivos trust cannot be reformed after the death of the trustor upon the claim of a scrivener's error. The Court further held that in the absence of fraud or undue influence any variation between the instructions of the trustor and the completed document were immaterial (R. 59 & 60).

ARGUMENT

POINT I.

AN INTER VIVOS TRUST CAN AND SHOULD BE REFORMED TO CONFORM TO THE TRUSTOR'S INSTRUCTIONS WHEN A MISTAKE IS MADE BY THE SCRIVENER IN THE PREPARATION OF THE TRUST INSTRUMENT.

Justice and common sense require correction of a scrivener's mistake in the preparation of a written document when such mistake thwarts the purposes and intent of the party executing the document. Reformation of the mistake based upon clear and convincing evidence is the appropriate remedy.

In Paulsen v. Coombs, 253 P.2d 621, the Utah Supreme Court rendered judgment reforming a written contract which contained a provision inserted by inadvertence or mistake. The Court indicated as follows:

"I am entirely in accord with the principle of preserving the sanctity of written contracts, but this applies only when the contract represents the intent of the parties. Where errors occur, clerical, typographical or otherwise, of course, a contract can be reformed to show the true intent of the parties. In order to prove such mistake and avoid the effects of the written contract, the evidence must be clear and convincing; that is, it must be such that there is no serious nor substantial doubt what the true intent is."

In Webb v. Webb, 209 P.2d 201, where decedent's legal representative and another were claiming right to realty under decedent, and decedent's intention was important in determining what claimants' rights were, and where conversations between the attorney and the decedent were admitted into evidence, the Utah Supreme Court

observed as follows:

"Thus where, after the death of the client, litigation arises between parties all of whom claim under the client and the question to be determined is not the existence of a right of action against the estate, but the intention of the decedent as to creation of various rights which remain ambiguous, the attorney may testify.***Thus an attorney has been permitted to testify in an inquiry to ascertain, as between devisees under the client's will and a grantee claiming under a deed from the client made after the will, as to what was intended by the deed."

In Sine v. Harper, 222 P.2d 571, the Supreme Court of Utah was asked to reform a deed based on conversations between one of the parties and the real estate agent. In holding that this evidence was properly admitted, the Court quoted language from another opinion as follows:

"The conversations between the attorney and the decedent show the attorney's authority and the purposes and limitations of such authority. The conversations between the attorney and respondents showed negotiations for and the consummation of a deal with respondents in accordance with the attorney's authority. There was no assertion by an extra-judicial witness of a material fact for the purpose of proving the existence of such fact, but the fact that such conversations occurred were circumstances which showed the purpose and intention of decedent to convey to the respondents unconditionally. The attorney was the one who acted for the decedent in the transactions involved herein and his evidence was competent to relate his version thereof and a relation of the conversations he had with the principals in the transaction was not hearsay, even though it necessarily included statements made by the other parties to the conversation which were not made in the presence of appellant.

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"The rule is thoroughly well settled,' remarks the California court, 'that, when the intention, feelings, or other mental state of a certain person at a particular time, including his bodily feelings, is material to the issues under trial, evidence of such person's declarations at the time indicative of his then mental state, even though hearsay, is competent as within an exception to the hearsay rule.'"

In Hurst v. Kravis, 333 P.2d 314, the Supreme Court of Oklahoma was asked to reform six trust agreements. The settlors alleged that there had been a clerical error in the preparation of the trust instruments. In holding that the trust instruments should be reformed on the ground of clerical error in their preparation, the Oklahoma Court observed as follows:

"This court has held that a trust may be reformed because of mistake and clerical error."

The case of Hurst v. Taubman, 275 P.2d 877, involved the construction of an express trust and was an action by settlors against the trustee. The Supreme Court of Oklahoma held as follows:

"In construing the terms of a trust agreement the intention of the settlor of the trust should control when such intention is not in conflict with established principles of law."

In Bench v. Pace, 538 P.2d 180, the Supreme Court of Utah held that the oversight on the part of a scrivener in preparing a real estate purchase option agreement was a proper basis for reformation of the document.

In Ford v. Ford, 492 S.W.2d 376, trustees brought suit against the beneficiary seeking reformation or modification of an

irrevocable trust. The Court of Civil Appeals of Texas held that where the attorney who wrote the trust instrument intended to write the trust in such a fashion as to make it irrevocable for a period of ten years but made a mistake in drafting the trust, reformation of the trust instrument to reflect that the trust was irrevocable was proper.

The case of First National Bank & Trust Company of Oklahoma City, Oklahoma v. Foster, 346 F.2d 49, involved an action to require co-trustees to accept an amendment or supplement to a trust agreement that they were administering. The United States Court of Appeals, Tenth Circuit, held that the intention of the settlor should control if not in conflict with established principles of law.

In the case of Title Insurance and Trust Company v. Guasti, 256 P.2d 629, the District Court of Appeal of California held that where testamentary trusts contained no provision as to whether trusts were to be re-evaluated for the purpose of determining the trustee's fee, that the admission into evidence of custom of trust companies in the community was proper by way of parol proof. The Court further indicated that this evidence was necessary to give effect to the intention of the parties.

In the case of In re Harmon's Trust, 164 N.Y.S.2d 468, the Supreme Court of New York County held as follows:

"If, in fact, there was a scrivener's error in transcribing settlor's intention at the time of creating the trust, it is correctible by the court in an action to reform the

instrument...In all the cases where reformation was granted by the court, petitioner presented direct and convincing evidence of the necessary facts of settlor's original intentions and instructions and of the mistake in the instrument as drawn."

In the case of Leitner v. Goldwater, 48 N.Y.S.2d 614, the Supreme Court of Bronx County held that the evidence established that the settlors intentionally amended the trust agreement so as to designate their wives as partial beneficiaries, and that the subsequent modification purporting to reinstate the estates as beneficiaries arose out of error in transcribing the true agreement of the parties and that this error was a proper basis for reformation of the trust agreement. The Court further observed that the failure of the settlors to read the modification which they signed, because they were busy men who imposed great confidence in their lawyer, would not of itself vitiate the right to reformation.

In the case of Vogel v. City Bank Farmers' Trust Company, 272 N.Y.S. 643, the Supreme Court of New York County held that a trust deed could be reformed based upon an error and mistake of the attorney who prepared the document in failing to include a revocation clause.

In Sheedy v. Stein, 101 N.Y.S.2d 773, the Supreme Court of Queens County held that it was proper to reform a deed because of a scrivener's error by the attorney who drew the deed. The Court observed as follows:

"Where a mistake is made by the scrivener in reducing an agreement to writing, such mistake may be corrected 'no matter how it occurred.'"

In Delap v. Leonard, 178 N.Y.S. 102, the Supreme Court, Appellate Division, of New York, held that it was proper to reform a deed containing an error made by the lawyer scrivener and observed as follows:

"The plaintiff should not be penalized because of this mistake. When there is no mistake about plaintiff's intention, but only in the writing, the mistake of the scrivener, no matter how it occurred, ought to be corrected.

"And this is so, notwithstanding a long period of time has elapsed between the time of the execution of the deed and the discovery of the mistake."

In the case of Mills v. Schulba, 213 P.2d 408, the District Court of Appeal of California held that it was proper to reform a deed because of a mistake of the attorney employed by the parties to draw up the deed. The Court observed:

"Our courts have repeatedly held that the mistake of a draftsman is a good ground for the reformation of an instrument which does not truly express the intention of the parties."

In Woolner v. Layne, 159 N.W.2d 237, the Court of Appeals of Michigan held that the inclusion of tax and insurance clauses in a lease was due to a scrivener's error which would serve as a basis for reformation of the document. The Court observed:

"The mistake was made when the real estate broker's secretary chose a printed form which contained clauses which had not been bargained for or discussed. Indeed, this was a scrivener's error and 'the clearest case for reformation is one involving a scrivener's error.'"

In Sunnybrook Children's Home, Inc., v. Dahlem, 265 SO.2d 921, the Supreme Court of Mississippi held that a scrivener's error in a deed was a proper basis for its reformation.

In Artmar, Inc., v. United Fire and Casualty Company, 148 N.W.2d 641, the Supreme Court of Wisconsin held that the negligence of an insurance agent in failing to incorporate insurance desires of insured into the insurance contract was a proper basis for reformation of the insurance contract. The Court observed:

"'A mistake due to the negligence of an agent, acting within the the scope of his employment, is satisfactory ground for reformation, since the insured ordinarily relies upon the agent to set out properly the facts in the application.'"

At the trial of the subject matter, Respondent argued that the rules pertaining to wills should be applied to the subject inter vivos trust. The trustor, Mrs. Rentmeister, executed a Last Will and Testament which was not material to the case and was not introduced into evidence. It was the trustor's inter vivos trust that was at issue and not her will. We submit that an inter vivos trust that is effective immediately upon execution and one that is created during the lifetime of the trustor is not a will and should not be treated as such. In 1 Restatement of Trusts 2d §57, the following is found:

"Disposition Inter Vivos Where Settlor Reserves Power to Revoke, Modify or Control

"Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary

and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.

"Comment:

"a. Where settlor reserves power to revoke and modify. Where the owner of property transfers it inter vivos to another person in trust, the disposition is not testamentary merely because the interest of the beneficiary does not take effect in enjoyment or possession before the death of the settlor (see §56, Comment f), or because in addition he reserves power to revoke or modify the trust. In such a case the trust is created in the lifetime of the settlor, and the mere fact that he can destroy it or alter it does not make the disposition testamentary, although if the trust were not to arise until his death the disposition would be testamentary. See §56.

"b. Where settlor reserves power of control. Where the owner of property transfers it inter vivos to another person in trust, the fact that he reserves not only a power to revoke and modify the trust but also power to control the trustee as to the administration of the trust does not make the disposition testamentary and invalid for failure to comply with the requirements of the Statute of Wills.

"c. Restrictions on testamentary disposition. The rule stated in this Section is applicable although the trust is one which could not be created by will. If the owner of property transfers it inter vivos to another person in trust, the intended trust is not invalid merely because the settlor reserves a beneficial life estate and a power to revoke or modify the trust, even though he was prohibited by statute from creating a similar trust by will.

"Thus, if it is provided by statute that the wife of a testator shall be entitled to a certain portion of his estate of which she cannot be

deprived by will (see §146A), a married man can nevertheless transfer his property inter vivos in trust and his widow will not be entitled on his death to a share of the property so transferred, even though he reserves a life estate and power to revoke or modify the trust. Where, however, an outright gift would not operate to deprive the wife of her distributive share, a trust created under the same circumstances would be equally ineffective.

"d. Purpose of the settlor. A trust in which the settlor reserves the beneficial life estate and a power to revoke and modify the trust is not invalid for failure to comply with the requirements of the Statute of Wills merely because the purpose of the settlor in creating the trust was to avoid the requirements of the Statute of Wills or to avoid the necessity of probate administration, or to avoid restrictions on testamentary dispositions."

In 1 Restatement of Trusts 2d Appendix §57, the following is found:

"There is a difference between the situation where the death of the settlor is a condition precedent to the creation of a trust, and the situation where the trust is created during the lifetime of the settlor, although he reserves power to revoke it. In the former case no trust is created unless the requirements for the execution of a will are complied with. See §56. In the latter case the trust is not testamentary and may be created without compliance with the requirements for the execution of a will."

CONCLUSION

The testimony of the attorney at the trial in this matter and Exhibit "C" representing the written directions of trustor establish by clear and convincing evidence that Respondent was meant to receive a specific cash distribution

and was not to share with the three natural children in the residuary estate of the trust. It is clear that a scrivener's mistake occurred when the attorney failed to exclude Respondent from the provisions of the paragraph distributing the residuary estate.

There appears to be a unanimity among the cases that the most obvious basis for reformation is a scrivener's mistake which thwarts the purposes and intention of the party executing the document. Trusts, contracts and deeds have been routinely reformed when the evidence was clear and convincing that a scrivener's error had taken place.

We respectfully urge the Court to reverse the judgment of the Trial Court and direct that the subject inter vivos trust be reformed to exclude Respondent from sharing in the residuary estate.

Respectfully submitted,

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